A **KERAJAAN NEGERI KELANTAN & ANOR**

v.

WONG MENG YIT & ORS

B COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
ALIZATUL KHAIR OSMAN JCA
[CIVIL APPEAL NO: W-01(IM)-171-04/2012]
C 27 JUNE 2012

CIVIL PROCEDURE: *Striking out - Abuse of process of court - Originating summons - Declaration of invalidity and ultra vires - Application without prior leave of Federal Court judge - Federal* D *Constitution, art. 4(3), (4) - Whether application should have been commenced by way of judicial review - Whether application void and invalid - Whether abuse of process of court - Rules of the High Court 1980, O. 53*

E ***CIVIL PROCEDURE:*** *Mode of commencement - Originating summons - Declaration of invalidity and ultra vires - Application without prior leave of Federal Court judge - Federal Constitution, art. 4(3), (4) - Whether application should have been commenced by way of judicial review - Whether application void and invalid - Whether abuse of process of court - Rules of the High Court 1980, O. 53*

F

Pursuant to s. 9 and s. 102 of the Local Government Act 1976 which prohibited and/or banned selling of lotteries and sweepstakes in Kelantan, the officers of the second appellant raided the first and second respondents' bookshops and seized G 'Big Sweep' sweepstakes lottery tickets. They were also compounded for trading without a MPKB-BRI license (Big Sweep), an offence under the Trade, Business and Industry (Municipal Council of Kota Bharu) By-laws 1989. The respondents then filed an originating summons against the H appellants, praying for general damages and declarations and challenging: (i) the validity of any laws, by-laws, regulations, orders or policies to make illegal, ban or prohibit activities involving betting and lotteries; and (ii) the jurisdiction of the State Legislative Assembly of Kelantan. It was contended that the laws I implemented by the first appellant were unconstitutional, *ultra vires* and invalid according to arts. 74 and 75 of the Federal Constitution. In turn, the appellants filed an application to strike out the respondents' originating summons with the argument that

the application should have been commenced by way of a judicial review and after leave of a Federal Court judge had first been obtained under art. 4(4) of the Federal Constitution. However, the application to strike out was dismissed by the High Court on the ground that the said application was an abuse of the process of the court. Dissatisfied with the said decision, the appellants appealed to this court.

Held (allowing appeal with costs; setting aside order of High Court)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The High Court judge had erred in dismissing the appellants' application to strike out the respondents' originating summons. The originating summons filed by the respondents was void and invalid. It was bound to fail and obviously unsustainable. It was an abuse of the process of the court and ought to be struck out under O. 18 r. 19(1)(d) of the Rules of the High Court 1980 ('RHC'). (paras 22 & 27)

(2) Any proceeding for a declaration that a law was invalid or had the direct effect of declaring a law was invalid and *ultra vires* the Federal Constitution shall not be commenced without obtaining leave of a Federal Court judge pursuant to art. 4(4), as stipulated by art. 4(3) of the Federal Constitution. It was not disputed that the respondents had not obtained any prior leave. The originating summons clearly fell within the ambit of art. 4(3) and (4) and without the said leave, the originating summons cannot be commenced at all. (paras 15, 16 & 22)

(3) The issue of judicial review was redundant and no more relevant. If what was being challenged by the respondents was the raid on the shops and the seizure of the sweepstake tickets and the decision to compound the respondents, the proper procedure to be taken by the respondents should have been through a judicial review under O. 53 RHC and not by way of an originating summons. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Berikutan peruntukan s. 9 dan s. 102 Akta Kerajaan Tempatan 1976 yang melarang dan/atau mengharamkan penjualan loteri dan ambil tagan di Kelantan, pegawai perayu kedua telah menyerbu kedai-kedai buku responden pertama dan kedua dan merampas

tiket loteri 'Big Sweep' ambil tagan. Mereka juga telah dikompaun kerana berniaga tanpa lesen MPKB-BRI (Big Sweep), suatu kesalahan di bawah Undang-undang Kecil Perdagangan, Perniagaan dan Perindustrian (Majlis Perbandaran Kota Bharu) 1989. Responden-responden kemudian memfailkan saman pemula terhadap perayu-perayu, memohon ganti rugi am dan pengisytiharan bagi mencabar: (i) kesahihan mana-mana undang-undang, undang-undang kecil, peraturan-peraturan, perintah-perintah atau dasar-dasar yang mengharamkan, atau melarang aktiviti-aktiviti yang melibatkan pertaruhan dan loteri; dan (ii) bidang kuasa Dewan Undangan Negeri Kelantan. Adalah dihujahkan bahawa undang-undang yang dilaksanakan oleh perayu pertama adalah tidak berperlembagaan, *ultra vires* dan tidak sah mengikut perkara 74 dan 75 Perlembagaan Persekutuan. Sebaliknya, perayu memfailkan permohonan untuk membatalkan saman pemula responden-responden dengan berhujah bahawa permohonan tersebut sepatutnya dimulakan dengan cara semakan kehakiman dan selepas mendapat kebenaran Hakim Mahkamah Persekutuan terlebih dahulu di bawah perkara 4(4) Perlembagaan Persekutuan. Walau bagaimanapun, permohonan untuk pembatalan itu telah ditolak oleh Mahkamah Tinggi atas alasan bahawa permohonan itu merupakan satu penyalahgunaan proses mahkamah. Tidak puas hati dengan keputusan itu, perayu-perayu telah merayu ke mahkamah ini.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan perintah Mahkamah Tinggi)

Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi telah terkhilaf dalam menolak permohonan perayu-perayu untuk membatalkan saman pemula responden-responden. Saman pemula yang difailkan oleh responden-responden adalah terbatal dan tidak sah. Ia sememangnya akan gagal dan jelas tidak mapan. Ia adalah satu penyalahgunaan proses mahkamah dan patut dibatalkan di bawah A. 18 k. 19(1)(d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

(2) Sebarang prosiding bagi suatu perisytiharan bahawa undang-undang adalah tidak sah atau mempunyai kesan langsung mengisytiharkan undang-undang tidak sah dan *ultra vires* Perlembagaan Persekutuan tidak boleh dimulakan tanpa mendapat kebenaran hakim Mahkamah Persekutuan menurut

perkara 4(4), seperti yang ditetapkan oleh perkara 4(3) Perlembagaan Persekutuan. Ianya tidak dipertikaikan bahawa responden-responden tidak mendapat sebarang kebenaran terlebih dahulu. Saman pemula jelas jatuh dalam lingkungan perkara 4(3) dan (4) dan tanpa kebenaran tersebut, saman pemula sama sekali tidak boleh dimulakan.

(3) Isu semakan kehakiman adalah tidak berbangkit dan tidak lagi relevan. Jika apa yang dicabar oleh responden-responden adalah serbuan ke atas kedai-kedai dan penyitaan tiket ambil tagan dan keputusan untuk mengkompaun responden-responden, prosedur yang sepatutnya diambil oleh pihak responden adalah melalui semakan kehakiman di bawah A. 53 KMT dan bukanlah melalui saman pemula.

Case(s) referred to:
Abdul Karim Abdul Ghani v. The Legislative Assembly of the State of Sabah [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1 SC ***(refd)***
Stephen Kalong Ningkan v. Tun Abang Hj Openg & Tawi Sli (No. 2) [1966] 1 LNS 185 HC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 4(3), (4), 74, 75
Interpretation Acts 1948 and 1967, s. 23
Local Government Act 1976, ss. 9(1), 102(i)
Rules of the High Court 1980, O. 18 r. 19(1)(d), O. 53

For the appellants - Dato' Hj Sulaiman Abdullah (Abu Bakar Jais with him); M/s Hisham Sobri & Kadir
For the respondents - Ryan Ng (Phang Soon Mun with him); M/s Sheng Lee Law Office

[Appeal from High Court, Kuala Lumpur; Originating Summons No: 24-54-2011]

Reported by Najib Tamby

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal by the appellants/defendants against the decision of the learned High Court judge dismissing the appellants' application to strike out the whole of the respondents' Originating Summons (OS) dated 6 June 2011 under O. 18 r. 19(1)(d) of the Rules of the High Court 1980 (RHC), on the ground that the said application was an abuse of the process of the court.

A **Factual Background**

[2] On 26 February 2011 officers from the 2nd appellant, Majlis Perbandaran Kota Bharu, Bandaraya Islam, raided the bookshops of the 1st and 2nd respondents in Kota Bharu and seized "Big
B Sweep" sweepstakes lottery tickets from each of the 1st and 2nd respondents' bookshops and later they were compounded for the offence of "trading without a MPKB - BRI Licence (Big Sweep)" under the Trade, Business and Industry (Municipal Council of Kota Bharu) By-laws 1989.

C **[3]** The "Big Sweep" tickets affected by the said raid are sweepstakes made lawful and permitted under the Racing Club (Public Sweepstakes) Act 1965 (federal law). In carrying out the raid, the appellants relied on the authority of their general powers
D pursuant to s. 9 and also s. 102 of the Local Government Act 1976 to issue any orders and/or policies to prohibit and/or ban the sale of lotteries and sweepstakes in the State of Kelantan.

[4] Section 9(1) of the Local Government Act 1976 states:

E (1) The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local authority by or under this Act in relation to matters which appear to the State Authority to
F affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.

[5] Section 102(i) of the same Act, provides:

G In addition to the powers of making by-laws expressly or impliedly conferred upon it by any other provisions of this Act every local authority may from time to time make, amend and revoke by-laws in respect of all such matters as are necessary or desirable for the maintenance of the health, safety and well-being
H of the inhabitants or for the good order and government of the local authority area and in particular in respect of all or any of the following purposes:

(i) to define the streets or areas within which shops, warehouses, factories or business premises may not be
I erected, or within which specified trades, businesses or callings may not be established or carried on.

[6] The respondents filed an OS against the appellants on 6 June 2011 and prayed for the following orders, namely: A

(a) a declaration that the State of Kelantan, acting through the appellants or otherwise, may not enact, issue, pass or make any: B

(i) laws or enactments to make illegal, ban or prohibit activities involving betting and lotteries, including sweepstakes;

(ii) orders or policies to make illegal, ban or prohibit activities involving betting and lotteries, including sweepstakes; C

(b) a declaration that matters involving betting and lotteries, including sweepstakes fall within the exclusive jurisdiction of Parliament to the exclusion of the State Legislative Assembly of Kelantan; D

(c) a declaration that the appellants have no jurisdiction or power under the Federal Constitution to enact, issue, pass or make any laws, bye-laws, regulations, orders or policies to make illegal, ban or prohibit activities involving betting and lotteries, including sweepstakes; and E

(d) general damages.

[7] The basis of the respondents' OS, based on the affidavit-in-support affirmed on 3 June 2011, and the respondents' submissions, are as follows: F

(a) the "Big Sweep" affected by the said action is a sweepstake made lawful and permitted under the Racing Club (Public Sweepstakes) Act 1965; G

(b) pursuant to art. 74 of the Federal Constitution, only Parliament, as the legislative body of the Federal Government of Malaysia, is seized of the authority to enact laws in respect of lotteries and sweepstakes in Malaysia since these are legislative matters listed under the Federal List in the Federal Constitution; H

(c) lotteries and sweepstakes in Malaysia are governed by the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965 respectively being federal laws which have been drafted by Parliament pursuant to art. 74 of the Federal Constitution; I

(d) pursuant to art. 74 of the Federal Constitution, the 1st appellant's legislative body has no authority whatsoever to enact any state laws on lotteries and sweepstakes since these are not legislative matters listed under the State List but instead listed under the Federal List in the Federal Constitution;

(e) the 2nd appellant also has no power whatsoever to enact any local authority by-laws in relation to lotteries and sweepstakes;

(f) pursuant to the provisions of the Lotteries Act 1952, only the Minister of Finance has the power to impose conditions on the manner in which and the places at which lottery tickets may be sold or distributed in Malaysia;

(g) pursuant to the provisions of the Racing Club (Public Sweepstakes) Act 1965, racing clubs which are members of the Malayan Racing Association are authorised to promote sweepstakes in Malaysia and everyone (including anyone who is not a member of the said racing club) is entitled to participate in the sweepstakes;

(h) as there are Federal laws governing lotteries and sweepstakes, namely the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965, the 1st Appellant has no power and is not entitled to implement its general powers under the Local Government Act 1976, in particular s. 9, to issue any orders and/or policies to prohibit and/or ban the sale of lotteries and sweepstakes made lawful and permitted under the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965 in the State of Kelantan;

(i) likewise, the 2nd appellant has no power and is not entitled to implement its general powers under the Local Government Act 1976, in particular s. 102, to enact any local authority by-laws to prohibit and/or ban the sale of lotteries and sweepstakes made lawful and permitted under the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965;

(j) the said action is not in accordance with Federal laws which have been drafted by Parliament, namely the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965, hence the said action is unconstitutional, *ultra vires* and invalid according to art. 75 of the Federal Constitution and s. 23 of the Interpretation Acts 1948 and 1967.

[8] The appellants on 3 August 2011 filed their application to strike out the respondents' OS under O. 18 r. 19(1)(d) of the RHC 1980, based on two main grounds, namely:

(a) that the respondents' application ought to have been commenced by way of a judicial review and not by way of an ordinary civil action or originating summons (OS); and/or

(b) even if the proceedings by way of ordinary civil action or OS is correct, respondents action ought to have been brought after leave of a Federal Court judge had first been obtained under art. 4(4) of the Federal Constitution.

[9] On 29 February 2012, the learned High Court judge dismissed the appellants' application with costs of RM2,000. Hence, the present appeal.

[10] In opposing the appellants' application for the striking out of the OS, the respondents submitted that leave of a Federal Court judge under art. 4(4) of the Federal Constitution is not required based on the following grounds:

(a) the Respondents never prayed for an order to overturn or declare any law passed by the Kelantan State Legislative Assembly as unconstitutional within the meaning of art. 4(3) of the Federal Constitution;

(b) the bye-laws passed by MPKB under the Local Government Act 1976 do not fall under the purview of art. 4(3) of the Federal Constitution;

(c) the respondents are merely seeking, among others, a declaratory relief from the court to declare that the appellants have no powers to enact, issue, approve or legislate any laws, enactments, directions and/or policies to ban gambling activities and lotteries such as sweepstakes. In this regard, it is entirely different relief from declaring a law passed by the appellants to be unconstitutional within the meaning of art. 4(3) of the Federal Constitution.

Findings Of This Court

[11] The nature of the respondents' claim or action in the OS can clearly be read and understood from the reading of the prayers in the OS itself supported by the supporting affidavit.

Prayers (a), (b) and (c) prayed for declaratory orders. In effect through all the three prayers the respondents are challenging the validity of "any laws, bye-laws, regulations, orders or policies to make illegal, ban or prohibit activities involving betting and lotteries, including sweepstakes" made by the State of Kelantan. They also in effect are challenging the jurisdiction or power of the State Legislative Assembly of Kelantan to make those laws which they claim to be within the exclusive jurisdiction of Parliament.

[12] The declarations sought can clearly be understood to be a challenge by the respondents that the laws in question as implemented by the 1st appellant are unconstitutional, *ultra vires* and invalid according to arts. 74 and 75 of the Federal Constitution allegedly because the 1st Appellant has no jurisdiction or power under the Federal Constitution to enact, issue, pass or make any laws, bye-laws, regulations, orders or policies to make illegal, ban or prohibit activities involving betting and lotteries, including sweepstakes.

[13] Article 74 of the Federal Constitution provides:

> 74 (1) without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.
>
> (3) the power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.
>
> (4) where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

[14] Article 75 of the Federal Constitution provides:

> 75. If any state law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

[15] The law on this issue is well-settled. It is trite that any proceeding for a declaration that a law is invalid or a declaration that has the direct effect of declaring a law is invalid and *ultra vires* the Federal Constitution (as in the present case) shall not be commenced without first obtaining leave of a judge of the Federal Court pursuant to art. 4(4) of the Federal Constitution on the ground mentioned in art. 4(3).

[16] Article 4(3) provides:

> (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or:
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

[17] Article 4(4) provides:

> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[18] In the present case, the respondents' OS clearly challenges or questions the validity of the relevant State law on the ground that the State of Kelantan has no power to make such law. Therefore, the respondents' action through the OS clearly falls within the ambit of art. 4 cls. (3) and (4) of the Federal Constitution. It is not in dispute that the respondents have not obtained any prior leave of a judge of the Federal Court before instituting the present OS in the High Court at Kuala Lumpur.

[19] The object and purport of art. 4(4) of the Federal Constitution has already been interpreted before in the case of *Stephen Kalong Ningkan v. Tun Abang Hj Openg & Tawi Sli (No. 2)* [1966] 1 LNS 185. The same interpretation was adopted and followed by the Supreme Court in the case of *Abdul Karim Abdul Ghani v. Legislative Assembly of the State of Sabah* [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1 where Hashim Yeop A Sani SCJ said:

> Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity in order to secure that frivolous or vexatious proceedings for such declarations are not commenced. Article 4(4) requires that the leave of a judge of the Supreme Court must first be obtained.

[20] In that case (*Abdul Karim*) the applicant therein was seeking, among others, for declarations that the respondent therein was not empowered to make laws with respect to the matter of disqualification for membership of the Assembly, and thus had illegally and unconstitutionally usurped the powers of Parliament. The orders sought were as follows:

> (a) a declaration that the respondents are not empowered to make laws with respect to the matter of disqualification for membership of the Assembly as effected by The Constitution (Amendment) Enactment No. 3 of 1986.
>
> (b) a declaration that the Constitution (Amendment) Enactment No. 3 of 1986 of the State of Sabah thereby effecting an amendment to the Constitution of the State of Sabah by addition of Clause 2(d) to Article 18 thereto is null and void and of no effect by reason of the respondents' incompetence to enact the same

[21] In dismissing the applicant's application Hashim Yeop A Sani SCJ held:

> Now we come to the application for leave. The application is under Article 4(4) of the Federal Constitution. Proceedings for declaration under Article 4(4) of the Federal Constitution that a law is invalid on the ground mentioned in clause 4(3), that is the legislature concerned has no power to enact it, shall not be commenced without leave of the judge of the Supreme Court.

[22] The 'leave' requirement under art. 4(4) of the Federal Constitution is mandatory. Without the said leave the respondents' OS, which clearly falls under art. 4(3) and (4) of the Federal Constitution, cannot be commenced at all. Therefore the OS filed by the respondents is void and invalid. In other words, the respondents' OS is bound to fail and obviously unsustainable. It is an abuse of the process of the court. On that stand, the said OS ought to be struck out under the O. 18 r. 19(d) of the Rules of the High Court 1980.

[23] On the above considerations, we are of the view that the respondents' OS has failed to comply with the mandatory requirement under art. 4(4) of the Federal Constitution and therefore must fail. On that ground alone, the appeal before us ought to be allowed with costs.

[24] The appellant also raised the issue of judicial review in that the respondents' application should be made by way of a judicial review *vide* O. 53 of the Rules of the High Court 1980. The appellant contended that any action to challenge the decision of a public authority must be commenced by way of a judicial review; and by filing the OS in the present case, the respondents are clearly trying to circumvent the strict requirements of the said O. 53. Therefore the appellants contended that the respondents' application is misconceived, invalid and cannot be sustained in law.

[25] The respondents on the other hand argued that the process of judicial review is not applicable in the present case because there is no decision by the appellants capable of being judicially reviewed. The respondents further argued that the respondents' application deals with the interference by a public authority with an individual's private and personal right to earn a living or run a trade or business; and therefore the respondents claimed to be entitled to litigate by way of a civil claim.

[26] In view of the earlier findings by this court that the respondents' OS has failed to comply with the mandatory requirement for 'leave' of a Federal Court judge under art. 4(4) of the Federal Constitution and on that ground alone, the appeal should be allowed and the respondents' OS must be struck out under O. 18 r. 19(d) of the RHC 1980, we feel that the issue of judicial review is redundant and no more relevant to the present appeal. It is sufficient for us to indicate here, at this point, that if

what is being challenged by the respondents is the raid on the shops and seizure of the sweepstake tickets and the decision to compound the respondents for the alleged offence, then the proper procedure to be taken by the respondents should be by way of a judicial review under O. 53 of the RHC 1980, and not by way of an OS.

Conclusion

[27] On the above considerations, we are satisfied that the learned High Court judge has erred in dismissing the appellants' application to strike out the respondents' OS under O. 18 r. 19(1)(d) of the RHC 1980. We find that based on the circumstances of the case as well as the pleadings of the respondents, it is obvious that the respondents' OS cannot stand in law and clearly unsustainable; and should be stuck out as it amounts to an abuse of the process of the court.

[28] We therefore allow the appeal with costs of RM10,000 to the appellants; and make an order that the deposit (if any) be refunded to the appellants. We set aside the order made by the learned High Court judge on 29 February 2012 and order that the respondents' OS be struck out.